U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: DEC 0 5 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the AAO on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a physician specializing in neonatology, dealing with the care of newborn and premature infants. When he filed the petition, the petitioner was two years into a three-year training fellowship at , a teaching hospital of the The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a statement from counsel and documentation of his board certification in pediatrics.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, P.L. 101-649, 104 Stat. 4978 (Nov. 29, 1990), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept of Transportation, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) (*NYSDOT*), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must establish that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must establish that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The term "prospective" is included here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on August 30, 2012. In an accompanying statement, counsel stated that the petitioner has influenced his field and earned "sustained national and international acclaim." The last term and other phrases in counsel's statement relate to a separate immigrant classification, "alien of extraordinary ability," discussed at section 203(b)(1)(A) of the Act and the USCIS regulations at 8 C.F.R. § 204.5(h). The petitioner had filed a concurrent petition seeking that classification, which has since been denied.

Counsel stated:

> Please note that [the petitioner] has extensive responsibilities as both a clinician and as a medical researcher, however his contractual services encompass and compensate clinical work only. This is customary in the medical profession. Virtually all academic researchers, who are not yet permanent residents, are not reimbursed contractually for any research work that they may perform. Furthermore, since the Department of Labor does not allow for a combination of occupations when filing a labor certification, we would not be able to require such a combination. Please note as well that once [the petitioner] becomes a permanent resident, he will be in a position to receive substantial funding for this important research work.
>
> . . . [A] very significant percentage of the patients that [the petitioner] treats receive Medicare and Medicaid. His outstanding diagnostic abilities allow him to diagnose these patients at earlier stages of their illnesses then [*sic*] the large majority of his colleagues would be able to. This saves the federal government a great amount of money because the need for later expensive and invasive procedures is avoided.

Counsel did not cite any evidence to support the claims quoted above. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Regarding counsel's claim that "the Department of Labor does not allow for a combination of occupations when filing a labor certification," the Department of Labor regulation at 20 C.F.R. § 656.17(h)(3) states:

> If the job opportunity involves a combination of occupations, the employer must document that it has normally employed persons for that combination of occupations, and/or workers customarily perform the combination of occupations in the area of intended employment, and/or the combination job opportunity is based on a business necessity. Combination occupations can be documented by position descriptions and relevant payroll records, and/or letters from other employers stating their workers normally perform the combination of occupations in the area of intended employment, and/or documentation that the combination occupation arises from a business necessity.

The quoted regulation shows that "a combination of occupations" is acceptable under certain specified conditions.

The petitioner submitted no evidence to support counsel's claim that "a very significant percentage of the patients that [the petitioner] treats receive Medicare and Medicaid." Going on record without

supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Also, counsel did not explain the relevance of this assertion, because there is no blanket waiver for physicians who treat patients on Medicaid and/or Medicare.

Counsel asserted that "it would be contrary to the national interest to deprive the prospective employer of the services of the alien by making the position available to United States workers" because the petitioner's "knowledge and skills are unique," he "is known in the medical community to possess clinical skills that cannot be objectively quantified," and "forcing him to pursue labor certification will limit his employment opportunity possibilities thus hampering his research work." Counsel stated that "[t]estimonials from renowned experts" support the petition.

The petitioner's initial submission included two witness letters, both from [redacted] faculty members. Dr. [redacted] associate professor of pediatrics and chief of the neonatology division at [redacted] stated:

> [The petitioner] is involved in research on respiratory distress syndrome which affects about 1% of newborn infants and is the leading cause of death in preterm infants, to develop a protocol for surfactant retreatment at [redacted] which may become the standard modality. . . . [The petitioner's] research is a retrospective cohort study for newborns admitted between July 2008 and June 2011 and will include 366 patients.
>
> This research is the first-of-its-kind assessing incidence of air leak syndrome after retreatment, analyze demographic and clinical data to suggest a new standard for the administration at minimal levels of respirator support. Thus, his work constitutes a tremendous advancement to the treatment of respiratory distress syndrome in preterm infants worldwide.
>
> [The petitioner] has also conducted significant work on the role of hypercalcemia in hypertensive babies in Broncho-pulmonary dysplasia, where [the petitioner's] research found that preterm babies with Broncho-pulmonary dysplasia who were ventilated for a long time was correlated with a higher risk for hypercalcemia. As a result of his pioneering discovery, this led to the creation of a new protocol that these babies should receive follow-up in the renal clinic routinely every 4 to 5 months until they reach the age of 5 years. This protocol, which was implemented at the [redacted] where he conducted his research, should become a new standard of care given to preterm infant patients with Broncho-pulmonary dysplasia as a precautionary measure.

The record contains no evidence from [redacted] to confirm the above claim, and Dr. [redacted] did not claim or establish that [redacted] had implemented any protocol developed by the petitioner or resulting from his work. Therefore, this claim is unsupported. *See*

Matter of Soffici at 165. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as above, evaluate the content of those letters as to whether they support the alien's eligibility. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The second witness, Professor [redacted] did not discuss the petitioner's research work. Instead, Prof. [redacted] stated that the petitioner "is an expert in high-risk pregnancies" whose "training and professional expertise makes him fully competent to offer his patients the full range of modern neonatal intensive care."

The petitioner also submitted copies of earlier recommendation letters from individuals involved in his medical training. These witnesses described the petitioner's training and expressed confidence in his clinical skills

Counsel stated:

> [The petitioner] has demonstrated his remarkable abilities as a medical researcher through his influential publications that have been instrumental in educating other clinicians. [The petitioner's] important work has been featured in prominent forums: Only the foremost members of his field have had their work presented at such influential forums, which draw nation- and world-wide audiences of their peers.

To support the above assertions, counsel stated:

> Please see attached documentation of [the petitioner's] research works being published in the [redacted] as well as his presentations of his works at the [redacted] on [redacted]

The petitioner did not establish that "[o]nly the foremost members of his field have had their work presented at such influential forums." Evidence of the existence of publications and presentations is not evidence of the influence of those works. The petitioner submitted evidence of presentations, including abstracts, printouts of electronic slides, and electronic mail messages concerning his participation in various conferences. He did not, however, submit evidence of publication in the *Manchester Pediatric Society Journal* as claimed. *See Matter of Soffici* at 165.

A printout of a June 6, 2012 electronic mail conversation indicates that the petitioner contacted "looking for a neonatologist position." of that institution responded: "I would be very interested in recruiting you." The printout ends with both parties agreeing to attempt to schedule a visit in the future.

To support counsel's comment about the petitioner's "frequent review of the work of his peers," the petitioner submitted copies of electronic mail messages from editors of A message dated July 3, 2012, 11:48 a.m., provided the petitioner's new user ID and password, and acknowledged that the petitioner's "name has been added to our reviewer database in the hopes that you will be available to review manuscripts." Two minutes later, at 11:50 a.m., another message went out, inviting the petitioner to review a manuscript for the journal. The petitioner also submitted copies of three manuscripts, including the one identified in the July 3, 2012 message. A second manuscript was also submitted to while the third was from Handwritten annotations indicate that the petitioner reviewed all three manuscripts in August 2012, just before he filed the petition. The record does not show that the petitioner had performed any peer review work before the summer of 2012, or how he came to review the article. The record establishes that did not approach the petitioner to serve as a peer reviewer. Rather, he volunteered his services by setting up an account.

The petitioner stated:

> is the largest online conglomerate for neonatologists. . . .
>
> I have been selected as a moderator and medical expert for this website due to my activity and contribution to the discussions. My thoughts have been valued a lot by other moderators as well.

An April 12, 2012 printout from an online forum "for professionals in neonatal medicine," stated: "The has just grown bigger and better, with the addition of new ambassadors!" The petitioner is among seven individuals named in the post, along with a pediatrician, a neonatal nurse, a specialist senior registrar, and other neonatologists. The record contains no other information about the forum, or the procedure by which it chooses its moderators.

The director issued a request for evidence (RFE) on November 6, 2012. The director acknowledged the petitioner's participation in research, but stated that the petitioner had not established his impact and influence in his field. The director requested further information about the petitioner's ongoing research; documentation of citation of the petitioner's claimed published work; and independent witness letters attesting to the petitioner's influence outside of institutions where he has worked.

In response, counsel stated:

> [The petitioner's] research works have been published in the [redacted] as well as his [*sic*] presented before the [redacted]

The above list matches the one submitted previously. Counsel acknowledged that the petitioner "does not currently have any citations to his name. His publication record is not significant. He is however participating currently in a very widely followed national study." Documentation about the study indicated that it took place at 18 different universities and hospitals across the United States, and that "[t]he purpose of the research is to determine which treatment is the first best for infants with NEC [necrotizing enterocolitis] and/or IP [intestinal perforation]." Patients enrolled in the study would be randomly assigned to one of two alternative, already existing treatments for the named disorders, and would receive the same care given to patients not participating in the study. The documentation does not indicate that the petitioner designed or initiated the study (preliminary documents predate the petitioner's employment at [redacted] or that his involvement went beyond reporting the outcome of standard patient treatment.

Counsel stated:

> Please note that apple [*sic*] is not primarily a researcher, he's primarily an outstanding clinical neonatologist. His peers from around the country have attested to this. Please see as well additional attached offer letters and interview request documenting his reputation. His opinion is on a consistent basis sought after by his peers.
>
> Furthermore, [the petitioner] has also been invited to swerve [*sic*] as a peer-reviewer for the prominent [redacted] and is a medical expert and moderator for the Neonatologists group on [redacted] further evidence of his national reputation.

The interview requests date from 2007-2009, and relate to fellowships (temporary training positions). They do not reflect demand for the petitioner's services as a fully trained and qualified neonatologist. The evidence in the record does not support counsel's claims regarding the significance of that documentation. For instance, there is no evidence to establish that a "national reputation" is required to become a moderator for [redacted] or that a national reputation results from that work. (The only submitted evidence regarding [redacted] is the list of seven "ambassadors" discussed above.)

Counsel stated that the petitioner "plans to continue to serve underserved populations in the future. This is his intention." Section 203(b)(2)(B)(ii) of the Act and USCIS regulations at 8 C.F.R. § 204.12 have established procedures by which certain physicians can receive the national interest waiver by working in underserved areas. The petitioner has not followed those procedures. A shortage of workers is not grounds for the waiver under the *NYSDOT* guidelines. *See id.* at 218.

Counsel asserted that the petitioner "is constantly teaching the use of the skills to both junior and even senior peers, as such creating a ripple effect that is making the performance of these procedures more widespread nationally." Counsel did not identify the procedures in question, and the petitioner has not established that he developed any widely used medical procedures. Teaching existing procedures, while employed at a teaching hospital, does not distinguish the petitioner from other physicians similarly engaged.

The director denied the petition on March 27, 2013. The director acknowledged that the petitioner is actively involved in the treatment of patients, but concluded that the submitted evidence "shows limited impact of the beneficiary's work" in that regard. The director stated that the record does not support several of counsel's key claims regarding the significance of the petitioner's work and his reputation in the field. The director acknowledged counsel's assertion "that there are no citations of the beneficiary's work." The director also stated:

> The petitioner stated that the beneficiary has been invited to serve as a peer reviewer for the , and that the beneficiary is a medical expert and moderator for Evidence of this was not found in the petitioner's response [to the RFE]. . . .
>
> Furthermore, the petitioner did not submit independent objective evidence that the beneficiary's role as a peer reviewer and moderator have influenced the field of endeavor.

On appeal, counsel states:

> We respectfully assert that clear evidence was submitted showing that [the petitioner] has made significant contributions to the field, that his work has impacted the national interest, especially his research, and that he has distinguished himself from his peers, thereby justifying the waiver of labor certification. Please again see below for a summary of major achievements.

The next three paragraphs of counsel's appellate statement read as follows:

> [The petitioner's] research works have been published in the as well as his [*sic*] presented before the .
>
> Please note that [the petitioner] is not primarily a researcher, he's primarily an outstanding clinical neonatologist. His peers from around the country have attested to this. Please see as well additional attached offer letters and interview request

> documenting his reputation. His opinion is on a consistent basis sought after by his peers.
>
> [The petitioner] has also been invited to swerve [*sic*] as a peer-reviewer for the prominent and is a medical expert and moderator for the Neonatologists group on further evidence of his national reputation.

Almost identical language appeared in counsel's response to the RFE, which the director already addressed in the denial notice. The quoted section of the appellate statement includes a reference to "additional attached offer letters and interview request" that does not apply on appeal, because the appeal does not include any such exhibits.

The director's assertion that the RFE response included no documentation of the petitioner's work as a peer reviewer or moderator, while technically true, does not take into account the petitioner's prior submission of evidence to that effect. That evidence has already received consideration earlier in the present appellate decision. The director was correct in the general conclusion that participating in peer review and moderating an online forum do not inherently demonstrate influence and impact on the field.

Counsel asserts that the petitioner "is not primarily a researcher, he's primarily an outstanding clinical neonatologist" whose "opinion is on a consistent basis sought after by his peers," and who "no doubt . . . has already saved the lives of many of [his] newborn patients. . . . Furthermore, his teaching work has been recognized within the field." Counsel cites no previously submitted evidence to support the above assertions. The evidence of record establishes that many neonatal conditions have high fatality rates, and therefore it is likely that the petitioner has saved the lives of a number of patients. This, however, appears to be an inherent fact about neonatology, rather than a factor that distinguishes the petitioner from other neonatologists. The petitioner has not established that his patients have had a significantly lower mortality rate than similar patients under the care of other neonatologists.

The only new exhibit submitted on appeal is a copy of a certificate showing the petitioner's board certification in pediatrics, effective October 18, 2012 (seven weeks after the petition's August 30, 2012 filing date). Counsel, on appeal, does not discuss this exhibit to explain its significance or to demonstrate that it overcomes the director's decision. No statute, regulation or case law states that board certification is grounds for granting the national interest waiver.

The petitioner has not established a past record of achievement at a level that would justify a waiver of the job offer requirement. The petitioner need not demonstrate notoriety on the scale of national acclaim, but the national interest waiver contemplates that the petitioner's influence be national in scope. *NYSDOT* at 217, n.3. More specifically, the petitioner "must clearly present a significant benefit to the field of endeavor." *Id.* at 218. *See also id.* at 219, n.6 (the alien must have "a past history of demonstrable achievement with some degree of influence on the field as a whole.").

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The AAO will dismiss the appeal for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.